



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 210/2016

In the matter between:

MN

Applicant/Plaintiff

and

BN

Respondent/Defendant

Coram: Van Zyl, J
Heard: 20 September 2024
Delivered: 25 October 2024
Summary:

Application for leave to appeal – test for – condonation – failure to adequately explain delay – prospects of success not good – the application for condonation and, consequently, the application for leave to appeal, dismissed, with costs, counsel's fees on scale B.

ORDER

1. The application for condonation and, consequently, the application for leave to appeal, are dismissed, with costs, with counsel's fees to be taxed on scale B.
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JUDGMENT

Van Zyl, J

[1] This is an application for leave to appeal against the order which I made and the judgment I delivered in terms whereof I dismissed the applicant's/plaintiff's claim and ordered him to pay the costs of the proceedings. I will refer to the parties as in the present proceedings.

[2] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 ('the Act'), determines as follows:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a)(i) the appeal *would* have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) ...' (My emphasis)

[3] In *Acting National Director of Public Prosecutions v Democratic Alliance In Re Democratic Alliance v Acting National Director of Public Prosecutions* (19577/09) [2016] ZAGPPHZ 489 (24 June 2016), the court held (at paragraph 25 of the judgment) that the Act has raised the bar for granting leave to appeal and in this regard it referred to the judgment of *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC), where the following was stated:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H**. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

See also *Rohde v S* 2020 (1) SACR 329 (SCA) para 8 and *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) para 4.

[4] In *Municipality of Thabazimbi v Badenhorst* (66933/2011) [2024] ZAGPPHC 195 (26 February 2024) paras 9 – 10 the court also dealt with the more stringent test for an application for leave to appeal and held, *inter alia*, as follows:

[9] ... A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is no reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success; not that another Court may hold another view.

[10] The Court *a quo* may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. ...

[11] In *MEC Health, Eastern Cape v Mkhitha* (1221/2015) [2016] ZASCA 176 (25 November 2016) the Supreme Court of Appeal held: " ... [17] *An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*"

[5] In considering whether there is some other compelling reason why the proposed appeal should be heard, as provided for in section 17(1)(a)(ii) of the Act, an important question of law or a discrete issue of public importance that will have an effect on future disputes, may constitute such a compelling reason. However, the merits thereof still need to be considered in deciding whether to grant leave to appeal or not. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2 the Supreme Court of Appeal determined as follows in this regard:

[2] In order to be granted leave to appeal in terms of s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act an applicant for leave must satisfy the court that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes. *But here too, the merits remain vitally important and are often decisive. Caratco must satisfy this court that it has met this threshold.*' (My emphasis)

See also *Poulter v Commissioner for South African Revenue Service* (Leave to Appeal) (A88/2023) [2024] ZAWCHC 100 (28 June 2024).

[6] Uniform rule 49(1)(a) and (b) determine as follows:

'(1)(a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.

(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: *Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.*' (My emphasis)

[7] The chronology of pertinent events and steps leading up to this application, are as follows:

- (a) The trial was conducted on 12 & 13 September 2017, 12 December 2017, 6 & 7 March 2018 and 19 April 2018.
- (b) Final arguments pursuant to the hearing of the evidence were advanced on 14 June 2018.
- (c) My order (dismissing the claim) was made on 13 December 2018 after both parties received prior notice of the proposed issuing thereof.
- (d) Reasons for the said order were requested on 18 December 2018.
- (e) My reasons for the aforesaid order ('my judgment') was unfortunately only made available on 13 June 2023.
- (f) The application for leave to appeal and, by then, the necessary application for condonation for the late filing thereof, was filed on 12 August 2024.
- (g) The application for condonation and leave to appeal were heard on 20 September 2024.

[8] It is trite that in an application for condonation an applicant should explain, comprehensively, the reasons for his delay and/or his failure to adhere to and comply with the prescribed time limits with which he was obliged to comply. There is an obligation on an applicant in a condonation application to explain each period

of delay. In *High Tech Transformers (Pty) Ltd v Lombard* (2012) 33 ILJ 919 (LC) the importance of a reasonable and acceptable explanation for a delay was accentuated at para 25 of the judgment:

'[25] . . . Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC):

"[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. . . . Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. . . ."

[9] An applicant should also show that he has reasonable prospects of success in the process for which he seeks condonation to proceed with (in the present matter that would be that there are prospects that the court which will entertain the appeal would come to another conclusion). In this regard the following applicable principle was stated in *Democratic Alliance v President of the Republic of South Africa* (21424/2020) [2020] ZAGPPHC 326 (29 July 2020) para 5:

'[5] This dictum serves to emphasis a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful.'

[10] In *PAF v SCF* 2022(6) SA 162 (SCA) para 21 the Supreme Court of Appeal held as follows:

'[21] A court considering a condonation application exercises a discretion in the true sense, upon consideration of all the circumstances of each case. In *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) ([2016] 1 All SA 313; [2015] ZASCA 209) para 17 it was held that the relevant factors in that enquiry generally

include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success. The onus is on the applicant to satisfy the court that condonation should be granted.'

[11] I shall also accept that good prospects of success on the merits can serve to scrutinize the explanation tendered for the delay somewhat less strictly. In *Melane v Santam Insurance* 1962 (4) SA 531 (A) at 532 E-F this principle is stated as follows:

'What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

[12] My judgment in this matter has been reported as *MN v BN* 2023 (5) SA 519 (FB); [2023] 3 All SA 809 (FB); (210/2016) [2023] ZAFSHC 236 (13 June 2023). I, as objectively as is humanly possible, believe that my judgment reflects and is testimony of the time and effort which went into preparing it despite the delay in delivering same.

[13] In the applicant's application for condonation, the applicant, rather comprehensively, referred to the, admittedly inordinate, delay between my order of 13 December 2018, his request for the reasons for the order which I made and, eventually, my furnishing of my reasons therefor.

[14] Although such delay may have prejudiced the applicant in other contexts, he, however, failed to explain how he (or his attorney) was thereby impeded from complying with his obligation to timeously file his application for leave to appeal.

[15] I do not propose to, herein, explain or proffer excuses for the delay on my part, *inter alia*, because such delay has been reported to the JCC and is already the subject matter of proceedings by such institution. The applicant and, of course, the

respondent, nevertheless and regardless of the reasons for the delay, deserve my sincere apology therefor and it is hereby proffered and recorded.

The reasons for the late filing of the application for leave to appeal:

[16] An affidavit deposed to by the applicant's attorney of record was filed with the application for leave to appeal in support of the applicant's application for condonation for the late filing of his application for leave to appeal. An answering affidavit deposed to by the respondent's attorney was filed in opposition to the founding affidavit. Heads of argument were also filed on behalf of both parties.

[17] The reasons for the order were sent via e-mail to the respective attorneys of record on 13 June 2023, as evident from annexure 'HJS1' attached to the answering affidavit. However, according to the applicant's attorney of record she only became aware of the reasons on or about 20 June 2023. Based on the date of 20 June 2023, the applicant should have lodged his application for leave to appeal by 11 July 2023. The applicant's application for leave to appeal and his application for condonation was only filed on 12 August 2024. In respect of the said delay, the applicant's attorney of record, *inter alia*, avers as follows in the application for condonation:

- '16. After I learned that the reasons for the order had been given, I informed the Applicant that he had the option to apply for leave to appeal against the order and reasons, however, he needed some time to consider the implications thereof.
17. During November 2023 the Applicant instructed me to proceed with the application for condonation and for application for leave to appeal.
18. Upon receiving his instructions, I immediately proceeded to brief counsel to draft the necessary documents.
19. In spite of constant follow-up calls, whatsapp messages, e-mails and attempted consultations at chambers, counsel could not provide me with the documents until June 2024, at which time counsel informed the Applicant that it was his opinion that there were little prospects of success in pursuing an appeal and therefore advised the Applicant against proceeding with the application for condonation and for leave to appeal.

...

29. The Applicant considered the opinion of counsel, however, he still wanted to proceed with the application for leave to appeal, being convinced that he had good prospects of success.

...

31. Counsel who had been briefed to draft the papers in November 2023 could, however, not take on the matter and new counsel was instructed to proceed with the application.'

[18] During arguments in support of the application for condonation, the applicant's counsel conceded – justifiably, I believe – that he applicant has failed to comprehensively or, even, adequately, explain or provide acceptable reasons for his delay, especially so in respect of the delay between 20 June 2023 and 9 November 2023. In addition, in my view, the deponent contradicted herself in relation to the applicant's reasons or explanations for the aforesaid delay, which contradictions are apparent from the following three paragraphs in the affidavit filed in support of the application for condonation:

- '16. After I learned that the reasons for the order had been given, I informed the Applicant that he had the option to apply for leave to appeal against the order and reasons, however, *he needed some time to consider the implications thereof.*

...

23. The Applicant is well aware that there has been an inordinate delay in bringing this application, however, he, *at all relevant times, wished to proceed with the application for leave to appeal.*

...

25. From 20 June 2023 until 9 November 2023, *in anticipation of an outcome in the complaint being considered by the JCC, the Applicant held off in giving further instructions on the application for leave to appeal.'* [My emphasis]

[19] The JCC's decision could in any event not have had any bearing on the applicant's decision in relation to the merits of the application for leave to appeal or on his wish or decision to appeal the order and judgment.

[20] Taking into account the margin with which the applicant failed to comply with Uniform rule 49(1)(b), his explanation therefor does not even approach a passing of the test laid down in the said Rule and the applicable authorities. In his attorney's

affidavit, and during argument, it was suggested that the applicant contemplated whether to apply for leave to appeal for almost 6 months. Even if that was so, I think he was obliged – and that it would have been prudent – to have timeously filed the application and then, if he decided or was advised not to pursue it, merely to have withdrawn the application.

The merits of the proposed appeal:

[21] The only question which then remains, is whether the applicant's prospects of appeal are so strong, or even, viable, that I can, at least to some extent, overlook his aforesaid failure in respect of adequately explaining the delay.

[22] I do not intend repeating all the grounds of the proposed appeal, since same already form part of the record. I do, however, deem it necessary to, *inter alia*, quote the following grounds:

- '8. At the end of the day, the Respondent claimed maintenance from the Applicant for a child which she had conceived from another man and she should at least have had some inclination that the child might not be her husband's child.
9. The case goes deeper than the mere question of whether the Applicant should be compensated for the maintenance which he had paid for a child that is not his biological daughter.
10. Ultimately, the case leaves one with the *moral question* of whether a man should be held responsible for paying maintenance of a child when he had made it abundantly clear that he did not want more children and even went as far as to book an appointment for an abortion, but the Respondent decided to keep the baby at the expense of the Applicant.' (My emphasis)

[23] As correctly pointed out by the respondent's counsel, the submissions in the heads of argument filed on behalf of the applicant, as well as the oral argument presented on behalf of the applicant, are not in line with the grounds of appeal referred to above. The applicant conceded in evidence that had he known that he was not the biological father of the child, he would still have financially supported her. According to the applicant's arguments this should not preclude him from claiming back the financial contributions which he had made towards the minor

child; at most, it should only lead to a reduction in the amount claimed. This was not the applicant's case before court in the trial; nor a ground of appeal.

[24] It is also evident from the whole of my judgment and the authorities referred to that it is essential to distinguish between 'a *moral question*' or '*moral duty*' as opposed to a '*legal question*' or '*legal duty*'.

[25] The applicant also raised the following ground of appeal at paragraph 5 of his application for leave to appeal:

'5. Although the cases referred to does not place an obligation on a wife to inform her husband that a child may not be his, it is respectfully submitted, that this obligation should change after divorce.'

[26] The aforesaid ground of appeal was argued by the applicant's counsel on a generalised basis that it would be fair for the law to be changed or developed accordingly, without any reference to the particular facts of the present matter and the cause of action and defences as pleaded. It was also not the applicant's case during the trial.

[27] Counsel for the applicant referred to and attempted to rely on what she cited as, 'the unreported judgment of *Nel v Jonker* (WCHC), case number A653/2009, dated 17 February 2001', and as discussed in *Obiter*, Vol 33, No. 1 (2012). However, apart from the fact that that claim was unsuccessful on appeal, the cause of action relied upon in that matter was enrichment and not fraud like in the present matter and is therefore distinguishable. In addition, the said judgment is indeed reported as *MN v AJ* 2013 (3) SA 26 (WCC) and I extensively dealt therewith and a discussion thereof at paragraphs 189 -190, read with paragraph 198, of my judgment. The article in *Obiter* referred to by the applicant's counsel in her heads of argument and in her oral argument does not take the matter any further.

[28] I concluded as follows at paragraph 199 of my judgment regarding the merits of the applicant's claim and the defences pleaded by the respondent:

'[199] In addition to my findings that the plaintiff did not prove his claim on the basis of fraud, I furthermore find that his claim is *contra bonos mores* and against public policy and can for this reason also and/or in any event not succeed.'

[29] The application for leave to appeal does not contain a single ground upon which the applicant avers that I erred in any respect in having concluded as aforesaid.

[30] In my view the answer to the question regarding the applicant's prospects of success on appeal does, consequently, also not favour the applicant. I have regard thereto that the law which apply to the applicant's cause of action in the circumstances of the present matter, is somewhat novel and therefore may constitute a compelling reason why the appeal should be heard. However, as evident from the applicable authorities referred to earlier in this judgment, the merits remain vitally important and it is for the applicant to satisfy the court that he has met the threshold. I cannot with any degree of conviction opine or find that another court would come to another or different conclusion than the one which I came to and which is recorded in my judgment.

[31] The respondent is also entitled to finalisation of the litigation between the parties and she should not unnecessarily be put through the further trauma, costs and delay of an appeal in the absence of a sound, rational basis to conclude that there is a reasonable prospect that the appeal would succeed.

[32] The application for condonation for the late filing of the application for leave to appeal and, hence, the application for leave to appeal as such, can consequently not be successful.

Costs:

[33] There is no reason why costs should not follow the outcome.

[34] With reference to Uniform rule 67A(3), read with Uniform rule 69(7), I agree with *Ghubhelabm (Pty) Ltd v R.A.W. Truck Trading CC* (B3217/2023) [2024]

ZAGPPHC 460 (26 April 2024), where the court found as follows at para 27 of the judgment:

'Costs orders, including the assessment of the appropriate Rule 69 scale, remain a matter for the exercise of judicial discretion.'

[35] In view of the totality of the factors to be considered in terms of Uniform Rule 67(A)(3)(b), as well as the facts and circumstances of the present matter, I agree with the submission of the respondent's counsel that the appropriate scale of counsel's fees is scale B.

Order:

[36] The following order is made:

1. The application for condonation and, consequently, the application for leave to appeal, are dismissed, with costs, with counsel's fees to be taxed on scale B.


C. VAN ZYL, J

Appearances

For the applicant: Instructed by:	Adv. N. van der Sandt Conradie Attorneys Bloemfontein E-mail: anet@conradieatt.co.za
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For the respondent: Instructed by:	Adv. P.C. Ploos van Amstel Stander and Associates Bloemfontein. E-mail: rikus@stanprok.co.za hanro@stanprok.co.za
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